ABORIGINAL RIGHTS AND THE CALDER CASE IN

ANTHROPOLOGICAL PERSPECTIVE[1]

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This paper examines the description of aboriginal rights that arises from court interpretations. For the purpose of this paper, aboriginal rights will be defined as those legal rights recognized as still in existance today by the courts which flow from a continuation of legal rights possessed by the original peoples of this country from a time prior to European contact. In principle, these rights would be perceived in principle as of two kinds: property rights including rights to use and occupy the land and title to surface and subsurface rights; and political rights such as the right to self government. The question to be addressed in this paper is which of these rights are recognized by the Canadian court system.

The idea that the original inhabitants of a newly acquired territory do not automatically lose their legal rights (such as title to their property) is well formed in British legal traditions. Generally speaking, these traditions take the position that while some rights may be abridged through general legislation, they cannot be extinguished except through an intentional act of the sovereign power: that is, by changing a law presumed to continue to exist from a period prior to the acquisition of this territory. Thus, it follows, that in principle the aboriginal peoples of North America should have the right to keep whatever legal rights they possessed prior to contact, which have not been extinguished by specific legislation.

The issue, then, is the simple matter of having the courts enforce these rights. The complication arises in the first place because of the necessity of the courts to recognize these rights in order to enforce them. The insurmountable difficulty aboriginal peoples have in obtaining such enforcements in the courts stem at heart from the failure of the entire legal and political system to recognize in principle that aboriginal peoples living

in Canada can have such rights. This difficulty, in itself, stems from an ethnocentric bias which is at the heart of our legal traditions about recognition.

This bias favours the familiar and indeed, in principle, it has always been easy for the British courts to recognize on-going legal rights in those newly acquired territories where the local inhabitants have traditions and values similar to their own. However, with colonial expansion, the British acquired new territories where the local inhabitants had traditions, values, and life styles much at variance with the British. In these situations, the British failed to recognize the principle that these were only different forms of society and instead applied the inherently ethnocentric ideology common to conquerors that these were inferior forms of society. Thus, the question of enforcement of existing rights by the courts deferred to a prior question: did these people even have rights which were rcognizable in a civilized court of law?

As the law is founded on the application of reason and logic, the courts developed a 'test' to determine the answer to this question. As the ideology within which this test was administered was ethnocentrically biased, so was the instrument itself. In the Elizabethan era, this test hinged on religious considerations. Christians, it was argued, might have such rights. Infidels, as non-Christians, never could. The reasoning behind this position was put most succinctly in Calvin's case in 1608 when the court said:

> All infidels are in law...perpetual enemies...(therefore) if a Christian king should conquer a kingdom of an infidel, and bring him under his subjugation then ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and nature. (Slattery 1979: 12)

In its most recent form, enunciated in 1919, the parameters changed to

suit the ideology of the times. Now only civilized people could have such rights while very primitive ones could not. But its fundamental ethnocentric bias remained the same: what is familiar is recognized, what is unfamiliar cannot be. This point of view was presented most authoritatively by the Privy Council Judicial Committee of the Privy Council (then the supreme tribunal for the Empire) when in 1911 Lord Sumner speaking for the court with highest British appeals authority argued:

> the estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and notions are not to be reconciled with the institutions and ideas of civilized society. Such a gulf cannot be bridged...On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have studied and understood, they are no less enforcable than rights arising under English law. (Hall 1973: 198)

What is crucial to point out, is that it is this very instrument which is still used by the courts of this country to determine whether or not the aboriginal rights of an indigenous group can be recognized. Indeed, as I will show below, sometimes with most annoying results.

In addition to recognition, to enforce aboriginal rights, the courts must accept that they were not extinguished but continue to exist today. Again, while the problem would seem to be a simple matter of examining the history of legislation, it is in fact a much more complex matter, for in many instances the legislation does not speak to the subject.

This situation, again, is rooted in the ethnocentric biases upon which our legal traditions are based. How this arises can be best illustrated through an examination of a most crucial aspect of our legal tradition: the theory of how new territory is acquired.

In principle there are, following Slattery (1979: 46), four ways in

which this can occur. These are: conquest or the military subjugation of a territory over which the sovereign clearly expresses the desire to assume sovereignty on a permanent basis; cession or where territory is formally transferred as through a treaty from one independent political unit to another; annexation or the assetion of sovereignty over another political entity without military action or treaty; and settlement or the acquisition of territory which is previously uninhabited or is not recognized as belonging to another political entity.

As can be seen, two fundamental types of acquisition are recognized. The first type, which includes conquest, cession and annexation, presumes the land to be inhabited. Hence, legislation will always be drafted with the rights of the inhabitants firmly in mind. In the second type (settlement), given the presumption that there are no original inhabitants, the law will develop without attending to these concerns. Thus, taking a piece of property as an example. In the former, the property will be obtained in some other manner from a previous owner, whereas in the latter it could be granted directly to new colonists without concern for former owners.

Were the test of 'occupancy' as it developed in the colonial era truly objective by modern standards such an opposition seems to be highly rational. However, were the definition based on ethnocentric biases, 'mistakes' can easily be made. As it happens, in colonial history, the latter is the case. Occupation for example, in the mid 18th century - at the height of British colonial expansion - was equated with 'cultivation', so that unoccupied land became, in the legal view, not based on the objective criteria of presence or absence of people, but rather on whether or not the people used the land for agriculture. This view is illustrated most forcefully by Lord Blackstone, a

leading English scholar of his time, who in his authoritative commentary on the laws of England, written in 1765, defined the typological opposition between 'occupied' and 'unoccupied' acquisition as follows:

> Plantations or colonies, in distinct countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force....But conquered or ceded countries, that have already laws of their own, the King may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain...(Sanders 1976: 144)

Given the existence of such ethnocentric biases, it is not hard to imagine that there were situations in which the colonists passed the kind of laws appropriate for unoccupied territories on lands that can be shown by contemporary standards were occupied. In such cases, something unique took place.

Unlike the situation in which newly acquired land is recognized as inhabited and thus new legislation speaks to the rights of the original peoples, in these circumstances, the Sovereign, when passing new legislation, logically remains silent as to the rights of the aboriginals.

The courts under these circumstances are called upon to deal with an ambiguity. On the one hand legislation enacted appears to have the result of abridging or even extinguishing these rights; on the other hand, the Sovereign has enounciated no clear policy to do so. The question to resolve, then, is whether the legislation passed did in fact extinguish or abridge these rights notwithstanding the fact that it did not speak to the subject.

If it did, then, regardless of what rights the aboriginals may have had, they no longer exist. If it did not, then they may still exist.

Thus, should the court take the position that legislation had extinguished the rights of the original people, the fact that the legislative tradition may have erred in assuming the territory to be unoccupied will be irrelevant. The rights no longer exist.

The importance of this point is brought into sharp focus by reference to an Australian example. In 1971, a group of Australian Aborigines brought a case to court in which they led evidence to show, among other points, that they had had rights at the time of contact of the sort the colonists should have recognized. Thus, they argued, the legislative tradition, which was built upon a theory of unoccupied lands, was mistaken. In making his judgment, Mr. Justice Blackburn, while appearing to accept the factual accuracy of this assertion, nonetheless ruled against the aborigines. His reasoning included, among other factors, the point that Australian legislation, despite the fact that it was based on an erroneous presumption that the lands were unoccupied, nonetheless had the effect of cancelling these rights. Thus he stated:

> For present purposes, the decision is an authority binding on this Court that New South Wales was a settled or peaceably occupied colony. Mr. Woodward (counsel for the aboriginal plaintiffs) contended that the statement of their Lord ships that New South Wales was 'a colony unoccupied, without settled inhabitants or settled law' was a statement which was historically inaccurate, particularly in the light of modern anthropological knowledge; the very evidence in this case, Mr. Woodward contended, was that the subject land, at any rate, was not without settled inhabitants or settled law; indeed, he said, the evidence showed that the subject land had highly settled inhabitants and settled law. In my opinion, in the light of the authorities...the question is one not of fact but of law. Whether or not the Australian aboriginals living in any part of New South Wales had in 1728 a system of law which was beyond the powers of the settlers at that time to perceive

> or comprehend, it is beyond the power of this court to decide otherwise than that New South Wales came into the category of a settled or occupied territory. (From Sanders 1976: 149f)

In short, then, in Australia the court refused to recognize the continued existence of aboriginal rights - despite new facts - in the face of a body of tradition and legislation based on the factually erroneous presumption that the land was unoccupied at the time of contact. This unfortunate result was only undone through the enactment of new legislation which explicitly recognized the existence of specific aboriginal rights in Australian law.

The decendents of the aboriginal people in the Canadian jurisdiction who wish to obtain court based enforcement of their aboriginal rights, then, first must obtain court acknowledgement on two crucial points. The first is that the courts must accept that these rights are reconcilible in British legal traditions. The second is that the courts must accept that these rights remain in legal existence despite legislation passed by the Canadian state authorities. Failure on the first test means that the aboriginal peoples never had any rights. Failure on the second means that, while the courts agree that they did have such rights, they were abridged or extinguished by Canadian legislation and so may no longer exist.

Were the Canadian legal tradition exactly the same as the Australian, the matter might be as expeditiously resolved. However, our colonial history with respect to aboriginal people is somewhat more complex. It seems true that, following Lester (161f), our law has developed, in general, on the presumption that Canadian territory was not previously occupied. On the other hand, one can point to innumerable exceptions to this proposition. Most obvious are the numbered treaties, such as those on the Prairies in

which the Crown actively sought and obtained land cessions in return for specific compensation and rights prior to opening up a region for settlement. There are also instances in which the Sovereign recognized and affirmed the rights of aboriginal peoples as in the Royal Proclamation of 1763 and the act transferring the territory of Rupert's Land to Canada. It can be seen as well, in the concern expressed by Federal authorities when lands, such as in British Columbia, were opened up for occupancy by colonists prior to obtaining cession from the original inhabitants.

As a result, there is the possibility, in theory, that the courts could rule that as a general principle certain aboriginal rights were acknowledged as existing by the Sovereign authority and that therefore legislation in not speaking to these matters was in fact supporting their continued existence. Were this to be the determination, then should the descendants of the aboriginal peoples obtain a finding that their societies possessed such rights in the aboriginal period, those rights would be seen to continue to exist in contemporary times. As such, the courts would be in a position to enforce them.

Although there developed in Canadian law a large body of cases in which the courts interpreted the meaning of the kind of rights aboriginal people had (such as these obtained in treaties and through such acts as the Royal Proclamation of 1763) in which the Sovereign had spoken, it was not until 1969 that a case was brought asking the courts to uphold an aboriginal right in a jurisdiction where the Sovereign did not appear to have spoken. Thus, it was not until that time that the general proposition of the continued existence of aboriginal rights was brought into a Canadian court for interpretation.

The case, known in the literature as the Nishga Case or the Calder Case was brought by Frank Calder, a chief of the Nishga and a number of other members of that Nation. The suit was couched in very careful language so as to make the widest determination with the least risk to the interests of the Nishga. Specifically, it limited the aboriginal right in question to an aboriginal title which included, at least, "an interest that was usufuctory in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative act (Hall 1973: 173)." As such, it focused the discussion on the one aspect of aboriginal rights that the Sovereign appeared in other jurisdictions to have been most careful in acknowledging: the right to collectively use and occupy the land for purposes such as hunting, fishing and trapping. As well, the suit limited the temporal component to the determination of whether the legislative acts of the colony of British Columbia and the Crown colony of Vancouver Island had extinguished these rights in the period prior to Confederation.

In order to establish this right, the lawyers for the Nishga, Mr. (now Justice) Berger and Mr. Rosenbloom, brought forward evidence on three points. The first was to establish, through the direct testimony of Nishga witnesses and of Dr. Wilson Duff, an anthropologist with long working experience among Northwest Coast groups that at the time of contact the Nishga had a system of land tenure which was 'recognizable in Canadian law.' Second, they introduced documents which purported to extend the intent of the Sovereign to respect an usuructuary right to the Indians of British Columbia. Specifically, they argued that the force of the Royal Proclamation of 1763 that the Indians "should not be molested or disturbed in the Possession of such parts of our Dominions and Territories as, not having been ceded to or

purchased by us, are reserved to them or any of them, as Hunting Grounds (in Hall p. 205)" extended to the Northwest Coast Indians by virtue of the statement:

> And we do further declare it our Royal Will and Pleasure, to reserve under our Sovereignty, Protection and Dominion - for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the west ward of the sources of the Rivers which fall into the Sea from the west and northwest...(from Hall 1973: 206).

Third, they introduced documents and expert testimony of a historian to show that the colonial legislature during the period in question had not passed any acts expressly extinguishing aboriginal title. As a result, since the Government of Canada had not done so in the period since Confederation, they argued that the Nishga still possessed the aboriginal right to use and occupy these lands.

For their part, the lawyers representing the Privince of British Columbia, the defendant in this case, argued that whatever claim the Nishga may have had based on aboriginal title (and they questioned whether such title had existed in the pre-contact period), it had been extinguished, albeit without having been expressly mentioned, by the general intent of the legislation passed by the colonial authorities in the Pre-Conferation period. As their evidence, they included a series of land use and other general legislative acts passed by the relevant colonial authorities in that period.

The case was tried in April of 1969. In October of that year, Mr. Justice Gould handed down his decision. In it, the judge agreed with the Provincial position and argued that had any aboriginal title existed it had been extinguished by the legislation of the colonial period. He thus dismissed the claim. However, in his judgment he did not express a view on

whether the Nishga had had an aboriginal title to be extinguished.

In 1970, the case was taken on appeal to the British Columbia Court of Appeals. In May of that year, a decision again unfavorable to the Nishga claim was expressed unanimously by Justices Davey, Tysoe, and Maclean. The basis for their finding was identical to that of Justice Gould for they held that had an aboriginal title existed, it had been extinguished by colonial legislation.

However, unlike the trial judge, the appeals court did express an opinion as to whether the Nishga possessed the kind of law that was recognizable in a Canadian court. Speaking for the three justices, Chief Justice Davey, the author of the opinion, said they did not, for, he argued:

> ...inspite of the commendation by Mr. Duff, a well-known anthropologist, of the native culture of the Indians on the mainland of British Columbia, they were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property...(Davey 1970: 483)

Therefore, he went on:

> I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation (Ibid: 483).

This he opposed to the situation in some parts of Africa:

> In which the territory of a people was ceded to the British Crown following conquest. The inhabitants had definite notions of rights of private property in specific pieces of land although of a communal, tribal and family nature, which it was presumed the Crown intended to respect and recognize and intended to be supported by the municipal courts (Ibid: 483).

In short, the appeals court rejected the Nishga Claim not only because legislation had extinguished their rights but because, in their view, Nishga society was too primitive to have law which a new sovereign would be able to

recognize.

In November 1971, the case was appealed to the Supreme Court of Canada. It was heard by a panel consisting of seven justices who included in order of seniority: Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin. The court reserved judgement for over a year finally rendering its opinion on the last day of January 1973.

Of the seven justices, six dealt with the substantive issue of aboriginal rights. One, Justice Pigeon, dealt only with the technical question of whether an action of this nature could be brought against the Province of British Columbia in the absence of legislation allowing suits against the Crown. He concluded that it could not, and so decided against the Nishga.

The remaining six justices dealt in some detail with all of the substantive points raised in the Nishga suit. Their determination on these issues was conveyed in two opinions: one written by Justice Judson with the concurrence of Justices Martland and Ritchie; the other authored by Justice Hall and agreed to by Justices Spence and Laskin.

On one point both opinions agreed. The Nishga, despite the opinion of the Appeals court, did possess at the time of contact, rights which were reconcilable with English law. Thus, Justice Judson said:

> ...the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means...(Judson 1973: 156).

In his opinion, Mr. Justice Hall went further to make it clear that in his view the Appeal Court had erred in interpretation when taking its position for he said:

> The assessment and interpretation of historical documents and

> enactments tendered in evidence must be approached in the light of present-day research and knowledge, disregarding ancient concepts formulated when understanding of the customs and cultures of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws, or culture, in effect a subhuman species (Hall 1973: 169).

Thus he went on, after citing the opinion of Chief Justice Davey of the Appeals Court,

> In so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards that Europeans applied to the Indians of North American two or more centuries before (Ibid: 170).

However, when examined in the light of contemporary knowledge, he concluded, there is no problem in finding that whether the land was acquired by 'discovery or conquest' (Ibid: 208) that the Nishga had a code of law reconcilable to British recognition.

The Court also agreed, although using different logic, that British recognition of this title during the colonial period should be acknowledged. Three judges, Hall, Spence and Laskin, argued that such recognition derives directly from the application of the Royal Proclamation of 1763 to British Columbia, for, according to Hall, the framers of this Proclamation were well aware of the existence of such an area and intended to include it when they stated that the Proclamation extended to all "Lands and Territories lying to the westward of the source of the Rivers which fall into the Sea from the North and Northwest...."

The other three justices, following Justice Judson's opinion, argued that the Royal Proclamation of 1763 did not extend to the region. However, they argued "Indian title" need not depend upon the conscious recognition of the Sovereign, but rather derives from the fact that the Indians had been there for centuries organized into societies.

Where the opinions split -3 to 3- was on the question of whether such title continued to exist in the face of colonial legislation. Three justices, Judson, Martland and Ritchie argued that it did not, for the legislative acts of the colonial period had the intent of being general legislation and therefore the effect of extinguishing any aboriginal title. As a result, they decided against the Nishga suit.

The three remaining justices took a diametrically opposed position on this point. Mr. Justice Hall, with Justices Spence and Laskin concurring, argued that, once recognized, aboriginal title, like the title of any conquered people, could not be extinguished without specific legislation. To this end, he cited two significant precedents among others. The first, which referred to an opinion by Lord Denning of the House of Lords, speaking as the highest appeal authority in Commonwealth Law, in 1975 when he said:

> ...in inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that (in acquired territories) the British Crown intends that the rights of property of the inhabitants are to be fully respected (quoted from Hall 1973: 209).

The second referred to an opinion by an American Justice Davis who in a case in 1967 respecting the Lipan Apache Tribe stated:

> ...in the absence of a 'clear and plain' indication in the public records that the sovereign 'intended to extinguish all of the (claimants) rights' in their property, Indian title continues...(quoted from Hall 1973: 260).

Thus, Justice Hall concluded:

> ...it would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent (the Province of British Columbia) and that intention must be 'clear and plain'. There is no such proof in the case at bar; no legislation to that effect (Ibid: 260).

In fact, he suggests that the documentary evidence for the period indicates

to the contrary that the colonial authorities were not given any "power or authorization to extinguish Indian title (Ibid: 217)." As a result, he supported the Nishga claim that their aboriginal title still remains in effect and could be enforced through court action.

To summarize then, the Nishga case provided a significant precedent for those who wished to obtain enforcement of aboriginal rights in the courts. Specifically, it upheld through the agreement of six justices that the Nishga did have in the aboriginal period a system of land ownership reconcilable to British jurisprudence. Further, there was a sentiment expressed that this system of land ownership could be recognized as existing in the colonial period either through the direct application of the Royal Proclamation or, more significantly, without there having been any direct statement from the sovereign to that effect.

With respect to the question of whether any aboriginal right could survive the acts of a colonial legislature, the court split three to three. One opinion agreed with the Australian interpretation that the colonial legislation did have that effect. The other three, however, argued to the contrary that at least with respect to aboriginal title, the right had survived colonial legislation and hence still remained in existence today.

In short, then, while the Nishga lost their case on a 4-3 judgement, the decision represented something of a new departure for it established, first of all the certainty that at least one aboriginal group possessed rights at the time of contact which were reconcilable to Canadian Law and second, and more significantly, that there was the strong possibility that at least one of these rights - the usufructory title; in at least one venue - the Nass Valley of British Columbia - had survived colonial legislation to remain in

existence today. Hence, it asserted the possibility that aboriginal peoples could, unlike in Australia, still possess rights which the contemporary court could recognize as existing and therefore enforce.

In the period since the Calder decision, judicial opinion has tended to support these propositions. In light, perhaps, of the strong majority on the Supreme Court, other judges have shown a real willingness to extend the notion of reconcilable law to other groups. This point, for instance, was supported in two specific cases: that of the Baker Lake Inuit and the James Bay Cree. Given the wide cultural diversity between the Nishga, the James Bay Cree and the Inuit, it seems fair to conclude that this proposition has gained a general acceptability in the courts. Judicial opinion, in the same cases cited above, as well, appears to be supportive of the possibility that aboriginal property rights may not be extinguished except by specific legislation and hence that certain aboriginal rights may have survived and be enforcable in the present day.

On the other hand, the courts since the latter decision in a number of decisions, while upholding the survival of aboriginal property rights, have consistently taken the position that these can be modified, limited, and abridged by laws which do not explicitly mention aboriginal rights. Thus, for example, although the Supreme Court held in the Nishga case that the Indians of British Columbia may have a right to hunt and fish on unoccupied land which is protected by the Royal Proclamation of 1763, they ruled in a 1976 case that, nonetheless, Native fishermen were subject to the same regulations as non-Native fishermen under existing Federal legislation, even though the legislation did not speak to the point (Laskin 1976: 159 f). In the following year, the court went further and unanimously accepted the

proposition that Indians in British Columbia, even if protected by the Royal Proclamation of 1763, must conform to the same provincial hunting regulations as non-Native hunters, unless it could be expressly demonstrated that to do so would inhibit their 'status and capacity' as Indians (Dickson 1977). In short, in following this reasoning, the courts have, on the one hand, accepted the existence of an aboriginal right, while, on the other, they have restricted it so that it has no more substance than the privileges extended to any resident. Finally, in a case that has not been appealed, Justice Mahoney extended this general line of reasoning specifically to aboriginal title. Citing specific Supreme Court decisions, he declared that this title had, it ever been a full proprietory one, had been abridged to an usufructory right. For he argued:

> If aboriginal title that arose in Rupert's Land (now the Northwest Territories)...were a proprietary right then it would necessarily have been extinguished by the Royal Charter of May 2, 1670 which granted the Hudson's Bay Company ownership of the entire colony. (Mahoney 1979: 75).

There have been no court actions since Calder, in which the subject of aboriginal rights as political rights has been at issue. Nor has there been any indication as to how the courts might view an assertion, such as an unextinguished right to self-government, in light of this decision. However, an examination of past precedent indicates that it would be highly unlikely to uphold such a proposition. One reason is that, while the courts, following Calder, would probably be willing to accept that aboriginal peoples at the time of contact had a form of self-government and might even accept factual evidence which shows its continuity into the present, they could not easily accept a reasoning that, in the official sense, these rights survived legislation which established, for example, the Parliamentary form

of Government for all citizens, including aboriginal peoples. The courts, as well, could take a second line of reasoning and declare that such assertions are questions respecting sovereignty and as such lie outside the judical competence of the municipal courts of this country. Such a declaration might imply, in principle, that the case should be taken into the international judicial arena. However, given that such tribunals as the International Court of Justice are empowered only to hear cases in which sovereignty already has international recognition, no native groups would have the standing necessary to bring the action. Hence, one can conclude that there is in fact no judicial forum in which aboriginal rights as political rights could be established.

Conclusions: Judicial Interpretation as Official Ideology

As we have seen in this chapter, in order to obtain a 'standing' to sue for their rights, an aboriginal people must demonstrate that their law at the time of contact was recognizable in British eyes and that their rights remain unextinguished in the present. In Canada, our legal traditions were developed around the proposition that, in principle, the aboriginal peoples here were too primitive to have such rights. As a result, our legal tradition developed in such a way that the possible consequences of legislation to the status of the rights of the original peoples was virtually ignored. It was presumed that, unless the Sovereign had spoken, no aboriginal group retained its rights into the present.

This legal tradition remained in place until the Supreme Court decision in the Nishga case in 1973. This decision established the principle that an

aboriginal society did exist at the time of contact in a form that demanded the recognition of their rights in our courts: the fact that we did not do so at the time notwithstanding. It also established the strong possibility that at least some of their rights remained in existence up to the present day. As such, the Nishga decision forced a recasting of Canadian legal traditions into a framework that conforms with a view called "cultural relativity" which states that no culturel can be properly seen as inferior to another. When cast in this light, Nishga society became transformed from a "primitive" to an "equal". Hence, like any other conquered society under British law, it retained the right to have its property and title to land respected and protected by the new Sovereign (until expressly extinguished by legislation) and had the standing to seek the courts' protection should it be necessary.

This landmark decision is not without its drawbacks. For instance, although the principle is established, it still remains necessary to "prove" a society is "civilized" to obtain standing in court. A problem which results is exemplified in the Baker Lake Inuit case where Mr. Justice Mahoney felt it appropriate to state:

> The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive (Mahoney 1979: 71).

Such a view runs counter to the principle of cultural relativity and appears, in a veiled form, as an attempt to return to earlier notions based on an evolutionary bias. Clearly, ethnocentric biases die hard.

Another concern is that the courts appear unwilling to undo, by themselves, the practical implications of this change in principle. This is

> so low on the scale of social organization that their usages and conceptions of rights and notions are not to be reconciled with the institutions and ideas of civilized society.

Instead, they would be justified on the legal but less morally appropriate grounds that the Sovereign has the power to enact such legislation. Hence, as I see it, the courts are arguing in a most compelling way that justice will only prevail in our relationship with Native societies when we begin to bring our legislative practice and traditions into conformity with the view that they are legitimate entities which have the continued right to collective existance.

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